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12 UNITED STATES DISTRICT COURT
13 DISTRICT OF NEVADA
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15 DANIELLE MAFFEO,) 2:09-cv-02274-HDM-LRL
16 Plaintiff,)
17 vs.) ORDER
18 STATE OF NEVADA, ex. Rel. BOARD)
19 OF REGENTS OF THE NEVADA SYSTEM)
20 OF HIGHER EDUCATION, and KAREN)
21 WEST,)
Defendants.)

22 **I. Factual and Procedural History**

23 Plaintiff is Danielle Maffeo, a former student of the
24 University of Nevada, Las Vegas, School of Dental Medicine.
25 Defendants are the State of Nevada ex. rel. Board of Regents of the
26 Nevada System of Higher Education, on behalf of the University of
27 Nevada, Las Vegas, (hereinafter referred to as "Board of Regents"
28 or "UNLV") and Karen West, Dean of UNLV's School of Dental

1 Medicine.

2 Plaintiff was a student at UNLV's School of Dental Medicine
3 from September 2005 to January 2008. At the end of her 2005 fall
4 term, plaintiff was indefinitely separated (expelled) from the
5 University for academic difficulties in her first semester by
6 former Dean of the Dental School, Dean Ferrillo. She appealed this
7 decision to the Student Appeals Committee. The Committee
8 recommended that plaintiff be allowed to return as a first year
9 dental student for the fall 2006 semester under stringent
10 conditions. A February 24, 2006 letter from Dean Ferrillo outlined
11 those conditions. According to the letter, plaintiff was required
12 to re-enroll as first year dental school student, maintain a B or
13 better in all courses, maintain at least a 2.0 GPA, fail no
14 courses, and remain on academic probation for the entire 2006-2007
15 school year.

16 Plaintiff reentered the program as a first year student and
17 successfully completed the fall 2006 term. However, during the
18 summer 2007 term plaintiff again failed two courses. In August
19 2007, the Student Progress Committee recommended plaintiff be
20 indefinitely separated from the University. On September 20, 2007,
21 defendant Dean of the Dental School Karen West issued her decision
22 to indefinitely separate plaintiff for failing to comply with the
23 conditions of Dean Ferrillo's reinstatement letter. Plaintiff
24 appealed this decision to the Dental Medicine Appeals Committee.
25 She was represented by counsel during the appeal and all related
26 hearings. On October 24, 2007, Dean West issued her decision
27 letter based on the Appeals Committee recommendation. Plaintiff
28 was allowed to remain on probation for the 2007-2008 academic year,

1 she was allowed to remediate her two failing grades, but was not
2 permitted to remediate any other grades while on probation, and
3 remediation of those grades was to be completed by November 30,
4 2007. Plaintiff was not indefinitely separated from the University
5 at that time.

6 Plaintiff failed to meet these conditions because she failed
7 two additional courses and only successfully remediated one prior
8 failed grade. Consequently, on December 12, 2007, Dean West issued
9 another letter indefinitely separating plaintiff from the
10 University for failing to adhere to the conditions of her
11 probation.¹ Plaintiff appealed that decision as well. In January
12 2008, plaintiff was not permitted to begin the spring 2008 term and
13 her tuition was refunded.

14 On January 11, 2008, plaintiff filed a complaint for temporary
15 restraining order and preliminary injunction in the Eighth Judicial
16 District Court, Clark County, Nevada. On January 11, 2008,
17 plaintiff also filed a petition for temporary restraining order.
18 Plaintiff sought redress for the December 2007 determination that
19 she be indefinitely separated from UNLV's dental program.
20 Plaintiff sought the temporary restraining order and preliminary
21 injunction in order to continue to attend classes. On January 22,
22 2008, the state court granted plaintiff's petition for a temporary
23 restraining order, which allowed plaintiff to return to the school
24 and attend classes. Defendants' subsequently filed a motion to
25 stay and an emergency appeal of the court's decision. An

26
27 ¹ The record indicates that plaintiff failed a total of eight (8)
28 courses while enrolled in UNLV's dental school.

1 evidentiary hearing on plaintiff's petition and defendants' appeal
2 was held on February 5, 2008. On February 28, 2008, the state
3 court issued an order finding that plaintiff had not met her burden
4 to obtain a preliminary injunction. As plaintiff's complaint only
5 addressed the preliminary injunction, the complaint was also
6 dismissed.

7 Plaintiff filed her federal complaint against the defendants
8 on November 20, 2009 alleging six causes of action: Fifth and
9 Fourteenth Amendment due process violations², breach of contract,
10 negligence in hiring, training and supervision, intentional and
11 negligent infliction of emotional distress, injunctive and
12 declaratory relief, and defamation, libel and slander per se.

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14 ² Plaintiff asserts that the defendants have violated her
15 procedural and substantive due process rights under the Fifth and
16 Fourteenth Amendments by promoting a de facto policy of reviewing
17 student appeals that has prevented plaintiff from returning to school
18 and effectively prevented her from being admitted to another
19 institution of higher learning. See Plaintiff's Complaint 4. In
20 addition, plaintiff alleges the defendants have not taken steps to
21 correct said policy or to properly train and supervise individual
22 employees in the proper constitutional and statutory limits to the
23 exercise of their authority. *Id.* at 5. In short, plaintiff alleges
24 Dean West acted intentionally or with deliberate indifference and/or
25 reckless disregard to plaintiff's due process rights when she
26 indefinitely separated plaintiff from the dental school, that Dean
27 West did not follow proper procedure as outlined in the student
28 handbook, and that UNLV is responsible for Dean West's conduct. *Id.*

1 Plaintiff seeks monetary damages and a declaratory judgment.

2 On March 22, 2010, defendants' filed a motion to dismiss
3 plaintiff's claims based on failure to state a claim under Rule
4 12(b)(6), res judicata and collateral estoppel, and Eleventh
5 Amendment immunity and qualified immunity in 42 U.S.C. § 1983
6 claims. On April 8, 2010, plaintiff filed her opposition.
7 Defendants replied on April 19, 2010.

8 On August 6, 2010, this court held a hearing on defendants'
9 motion to dismiss. At that hearing, the court converted the
10 defendants' motion to dismiss to a motion for summary judgment.
11 Plaintiff was granted sixty (60) days from the date of the hearing
12 to file a supplemental responsive pleading. In addition, the court
13 allowed limited discovery within the briefing period and granted
14 plaintiff leave to amend her complaint. Plaintiff did not file a
15 supplemental responsive pleading or an amended complaint by the
16 October 5, 2010 deadline. For the reasons set forth below,
17 defendants' motion to dismiss, now converted to a motion for
18 summary judgment, is granted as to all federal claims. All of
19 plaintiff's federal claims are dismissed with prejudice and any
20 pendent state law claims are dismissed without prejudice.

21
22 **II. Summary Judgment Standard**

23 Summary judgment "shall be rendered forthwith if the
24 pleadings, depositions, answers to interrogatories, and admissions
25 on file, together with the affidavits, if any, show that there is
26 no genuine issue as to any material fact and that the moving party
27 is entitled to judgment as a matter of law." Fed. R. Civ. P.
28 56(c). The moving party is entitled to judgment as a matter of law

1 where no genuine issues of material fact remain in dispute. Fed.
2 R. Civ. P. 56(c). See also *Northwest Motorcycle Ass'n v. U.S.*
3 *Department of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994).
4 Judgment as a matter of law is appropriate only where there is no
5 legally sufficient evidentiary basis for a reasonable jury to find
6 for the non-moving party. Fed. R. Civ. P. 50(a). The court views
7 the evidence and any inferences in the light most favorable to the
8 non-moving party. *Bagdad v. Nazar*, 84 F.3d 1194, 1197 (9th
9 Cir.1996).

11 **III. Decision**

12 A. The Eleventh Amendment Bars Suit for Monetary Damages 13 Against All Defendants in Their Official Capacities

14 Eleventh Amendment immunity bars plaintiffs from bringing
15 claims for monetary damages in § 1983 actions against a state or
16 its officials acting in their official capacities unless the state
17 has waived its immunity or Congress has exercised its power to
18 override that immunity. *Seminole Tribe of Fla. v. Florida*, 517
19 U.S. 44 (1996); *Will v. Michigan Dep't of State Police*, 491 U.S. 58
20 (1989). Nevada has refused to waive its immunity. Nev. Rev. Stat.
21 § 41.031(3) (2003).

22 Eleventh Amendment immunity extends to state instrumentalities
23 and agencies. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). This
24 court has held that the university system in Nevada is a state
25 instrumentality or agency within the meaning of the Eleventh
26 Amendment. *Johnson v. University of Nevada*, 596 F. Supp. 175
27 (D.Nev. 1984).

28 However, in *Ex parte Young*, 209 U.S. 123 (1908), the Supreme

1 Court held that the Eleventh Amendment immunity doctrine does not
2 bar suits "brought in federal court against state officials in
3 their official capacities for prospective injunctive relief to
4 prevent future violations of federal law." *Fond du Lac Band of*
5 *Chippewa Indians v. Carlson*, 68 F.3d 253, 255 (8th Cir. 1995).
6 Therefore, to the extent that plaintiff is seeking injunctive
7 relief, she may sue the individual defendants in their official
8 capacities. *Will*, 491 U.S. at 71.

9 Plaintiff did not sue the Board of Regents in their individual
10 capacities. Accordingly, the Board of Regents is immune from suit
11 under § 1983. In addition, Dean Karen West in her official
12 capacity is immune from suit for damages because a suit against a
13 state official in her official capacity is a suit against the
14 official's office. *Will*, 491 U.S. at 71.

15 B. Defendant Dean West is Protected from Suit for Damages in
16 Her Individual Capacity by Qualified Immunity

17 Qualified immunity protects government officials performing
18 discretionary functions from liability for civil damages "insofar
19 as their conduct does not violate clearly established statutory or
20 constitutional rights of which a reasonable person would have
21 known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The court
22 must determine: (1) taken "in the light most favorable to the party
23 asserting the injury, do the facts show the officer's conduct
24 violated a constitutional right?"; and (2) if yes, was the violated
25 right "clearly established"? *Saucier v. Katz*, 533 U.S. 194, 200-01
26 (2001). For a right to be clearly established, "its contours must
27 be sufficiently clear that a reasonable official would understand
28 what he is doing violates that right." *Hope v. Pelzer*, 536 U.S.

1 730, 739 (2002).

2 Construing the facts in the light most favorable to the
3 plaintiff, defendant Dean West is shielded by qualified immunity
4 because the facts show that Dean West's conduct did not violate
5 plaintiff's due process rights.

6 *i. Procedural Due Process*

7 A due process claim requires a two-part analysis - that
8 plaintiff was deprived of a protected interest, and if so, what
9 process was she due. *Logan v. Zimmerman Bush Co.*, 455 U.S. 422,
10 428 (1982). Plaintiff has a protected property interest in
11 continued enrollment at a public institution of higher learning.
12 *Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84-5 (1978). However,
13 plaintiff is entitled to only minimal procedural due process
14 because she was removed from the dental school for academic
15 reasons. When a student is suspended from a public school or
16 university for disciplinary reasons due process requires "that the
17 student be given oral or written notice of the charges against
18 [her] and, if [she] denies them, an explanation of the evidence the
19 authorities have and an opportunity to present [her] side of the
20 story." *Goss v. Lopez*, 419 U.S. 565, 581 (1975). Such complete
21 procedural safeguards do not apply when a student is dismissed for
22 failure to meet academic standards. *Horowitz*, 435 U.S. at 84.
23 Procedural due process is satisfied for the dismissal of a student
24 for academic reasons if the student had (1) prior notice of faculty
25 dissatisfaction with her performance and of the possibility of
26 dismissal, and (2) if the decision to dismiss the student was
27 careful and deliberate. *Id.* At 85.

28 Plaintiff was afforded more than the minimal procedural due

1 process required for her academic dismissal. On February 24, 2006,
2 Plaintiff was advised in writing by Dean Ferrillo that instead of
3 indefinitely separating her from the University, she could repeat
4 her first year of dental school and be placed on probation for the
5 entire 2006-2007 academic year. She was required to meet certain
6 conditions while on probation, including not failing any additional
7 courses. In the summer of 2007, plaintiff failed two additional
8 courses. Dean West then recommended she be indefinitely separated
9 from the University. Plaintiff appealed this decision, was
10 permitted a hearing with counsel present as an advisor, and was
11 successful. In a letter from Dean West dated October 24, 2007,
12 plaintiff was allowed to remediate her two failed courses and was
13 again placed on probation. However, plaintiff was advised that if
14 she failed any additional courses, she would not be allowed to
15 remediate those grades. In December of 2007, plaintiff had failed
16 to remediate one course, and she failed two additional courses.
17 Accordingly, Dean West recommended she be dismissed from the
18 program. Plaintiff appealed this decision as well. On January 4,
19 2008, plaintiff had a hearing in front of the Academic Appeals
20 Committee. Again, counsel was present. The committee upheld the
21 decision of Dean West and plaintiff was indefinitely separated from
22 UNLV's dental program.

23 The UNLV Dental School Student Handbook provides that the
24 student progress committee notify the Dean if a student is
25 academically struggling. The Dean has discretion to recommend the
26 student be placed on probation, repeat the year, or be separated
27 from the University. The handbook also provides that a student may
28 appeal the Dean's decision to the Academic Appeals Committee. The

1 student is permitted a hearing, after the hearing the committee
2 makes recommendations to the Dean, who issues the final decision.
3 If the student is dissatisfied with the final decision she may
4 appeal it to the University Provost or President.

5 The University and Dean West followed all of the regulations
6 set forth in the Student Handbook. They also afforded plaintiff
7 many opportunities to improve her academic record before finally
8 recommending she be dismissed permanently from the program. The
9 process plaintiff received in this case was substantially greater
10 than that afforded to students who are subject to academic
11 proceedings. Plaintiff received both written notice and an
12 opportunity to respond. See *Goss v. Lopez*, 419 U.S. at 581.
13 Consequently, plaintiff has failed to show that a triable issue of
14 material fact remains on her due process claim against Dean West.

15 *ii. Substantive Due Process*

16 Substantive due process provides heightened protection against
17 government interference with certain fundamental rights and
18 liberties. Although courts hesitate to extend substantive due
19 process protection to non-liberty interests, courts may review an
20 academic decision of a public education institution under the
21 substantive due process standard. See *Moore v. City of East*
22 *Cleveland, Ohio*, 431 U.S. 494, 503 (1977). In doing so the court
23 must show great "respect for the faculty's professional judgment,
24 [and should not] override it unless it is such a substantial
25 departure from accepted academic norms as to demonstrate that the
26 person or committee responsible did not actually exercise
27 professional judgment." *Regents of the University of Michigan v.*
28 *Ewing*, 474 U.S. 214, 225 (1985).

1 To establish a violation of substantive due process, a student
2 must demonstrate arbitrary and capricious conduct on the part of
3 university officials by showing that there was no rational basis
4 for the university's decision, or must show that the dismissal was
5 motivated by bad faith or ill will unrelated to academic
6 performance. *Horowitz*, 435 U.S. at 91-92. A student may maintain a
7 substantive due process claim if the university's actions
8 constituted a "substantial departure from accepted academic norms
9 as to demonstrate that the person or committee responsible did not
10 actually exercise professional judgment." *Ewing*, 474 U.S. at 225.

11 The record does not support plaintiff's claim that her
12 dismissal was arbitrary or capricious. Nor does it establish that
13 the University's actions substantially departed from academic norms
14 so as to demonstrate that Dean West did not exercise professional
15 judgment. *Id.* Plaintiff struggled in dental school and received a
16 total of 8 failing grades. She was placed on academic probation
17 multiple times, and she repeatedly failed to meet the conditions of
18 probation. The decision to dismiss her from the program was
19 neither capricious nor arbitrary. Instead, it was the product of
20 at least a year and a half of professors, administrative committees
21 and school deans working with plaintiff to improve her academic
22 performance. Dean West complied with all the procedural
23 requirements set forth in the student handbook. She gave plaintiff
24 notice of her poor performance, discussed her performance and
25 possible remediation of failing grades with her, and provided her
26 with several hearing opportunities. There were multiple,
27 legitimate academic reasons to dismiss plaintiff from the program.
28 She received all the process she was due. Dean West's decision to

1 dismiss plaintiff was careful, deliberate and objectively
2 reasonable. Further, plaintiff was given an opportunity by this
3 court to conduct discovery and file a supplemental response to
4 defendants' motion. She elected not to do so. Plaintiff has
5 failed to show that a triable issue of material fact remains to be
6 tried on her substantive due process claim. Accordingly,
7 plaintiff's due process claims against Dean West are dismissed with
8 prejudice.

9
10 **IV. Declaratory/Injunctive Relief is not Barred by Res Judicata,**
11 **but is Denied on Other Grounds**

12 Collateral estoppel precludes re-litigation of issues argued
13 and decided in prior proceedings. *Myers v. City of Cheney*, No. CV-
14 07-0317-JLQ, 2007 WL 3254720, at * 5 (E.D. Wash. Nov. 2, 2007).
15 Res judicata precludes parties from re-litigating causes of action
16 that were brought, or could have been brought in a prior action.
17 *Id.* When a state court judgment is offered for res judicata or
18 collateral estoppel effect, a federal court must determine, based
19 on state law, whether judgment is final and therefore conclusive in
20 federal court. *Turnbow v. Pacific Mutual Life Insurance, Co.*, 934
21 F.2d 1100, 1102, (9th Cir. 1991). Under Nevada law, a judgment on
22 the merits of an issue bars further consideration of that issue.
23 *Id.*

24 Ordinarily, findings of fact and conclusions of law made in a
25 preliminary injunction proceeding do not preclude re-examination of
26 the merits at a subsequent trial. See, e.g., *University of Texas*
27 *v. Camenisch*, 451 U.S. 390, 395 (1981); *Levine v. First National*
28 *Bank of Commerce*, 948 So. 2d 1051, 1057 (La. 2006) (The summary

1 proceedings to obtain a preliminary injunction may certainly touch
2 upon or tentatively decide merit issues, but they are seldom, if
3 ever, considered decisions on the merits.). Rather, in granting,
4 or not granting, a preliminary injunction, a court is making a
5 determination that there is a likelihood, or lack thereof, of
6 success on the merits. *Casa Dimario, Inc. v. Rhode Island*
7 *Department of Business Regulation*, No. PC-02-1642, 2004 WL 1542069
8 (R.I. Super. June 16, 2004); *DiDonato v. Kennedy*, 822 A.2d 179, 181
9 (R.I. 2003). Thus, absent a final judgment or decision on the
10 merits of an issue in the preliminary injunction hearing, the
11 doctrines of res judicata and collateral estoppel cannot act to bar
12 a subsequent action on the merits. *Id.*

13 In this case, the decision by the state court denying
14 plaintiff's petition for a preliminary injunction, was not a final
15 decision on the merits. However, for the reasons set forth above,
16 plaintiff has failed to show her due process rights were violated,
17 and therefore, she is not entitled to injunctive or declaratory
18 relief on these grounds.³ Plaintiff must demonstrate the
19 likelihood of future injury in order to win an award of prospective
20 injunctive relief. *Kruse v. Hawaii*, 68 F.3d 331, 335 (9th Cir.

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22 ³ A declaratory judgment may be paired with injunctive relief
23 where appropriate. *Aronoff v. Cattleman*, 345 P.2d 221 (Nev. 1959).
24 A declaratory judgment requires a justiciable controversy. *Kress v.*
25 *Corey*, 189 P.2d 352 (Nev. 1948). As plaintiff has failed to present
26 sufficient evidence that her due process rights we violated, no
27 justiciable controversy exists. She is not entitled to a declaratory
28 judgment.

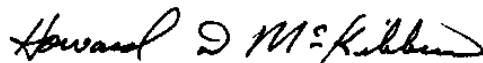
1 1995). There must be a credible threat that plaintiff will be
2 subjected to the specific injury she seeks injunctive or
3 declaratory relief for again. *Kolender v. Lawson*, 461 U.S. 352,
4 355 (1983). For the reasons set forth above, plaintiff's claim for
5 prospective injunctive relief is denied.

6
7 **IV. Conclusion**

8 Plaintiff's federal claims are dismissed with prejudice. The
9 court declines to assert supplemental jurisdiction over plaintiff's
10 state law claims. See *Williams v. Costco Wholesale Corp.*, 471 F.3d
11 975, 977 (9th Cir. 2006). Accordingly, plaintiff's state law
12 claims are dismissed without prejudice.

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14 **IT IS SO ORDERED.**

15 DATED: This 19th day of October, 2010.

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17 UNITED STATES DISTRICT JUDGE
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